IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 26TH JUNE 2007 / 5TH ASHADHA 1929

OP.No. 18099 of 2001(D)

PETITIONER:

U.MOHAMMED, UNGUNGAL HOUSE,
TANALUR P.O., MALAPPURAM DIST.

BY ADV. SRI.PKM.HASSAN
SRI.J.JULIAN XAVIER
SRI.FIROZ K.ROBIN

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY ITS SECRETARY,
GENERAL EDUCATION DEPARTMENT, THIRUVANANTHAPURAM.

2. DEPUTY DIRECTOR OF EDUCATION,
MALAPPURAM.

3. ASSISTANT EDUCATIONAL OFFICER,
TANUR.

BY GOVT. PLEADER SMT.T.B.RAMANI

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 26/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO.29099 OF 2001 IN OP NO.18099 OF 2001 D

//DISMISSED//

26.06.2007. SD/- THOTTATHIL B.RADHAKRISHNAN, JUDGE.

APPENDIX

PETIITONER'S EXHIBITS:

EXT.P1: TRUE COPY OF THE ORDER DATED 20.10.94 OF 2ND RESPONDENT.

EXT.P2: TRUE COPY OF THE ORDER DATED 31.10.96 ISSUED BY THE 3RD RESPONDENT.

EXT.P3: TRUE COPY OF THE COPY OF THE REPRESENTATION DATED 24.2.97.

EXT.P4: TRUE COY OF THE REPRESENTATION DATED 31.5.2001 FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.

/TRUE COPY/

THOTTATHIL B.RADHAKRISHNAN, J.

O.P.No.18099 OF 2001

Dated this the 26th day of June, 2007

JUDGMENT

Petitioner, then a PD Teacher, availed three continuous spells of leave without allowances for five years each, totalling to 15 years, the last spell of which expired on 18.9.1992, in terms of Appendix XII A of Part I of the Kerala Service Rules, hereinafter, "KSR", for short, for taking up employment abroad. He did not re-join duty on expiry of the leave. Action followed under the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, hereinafter, the "CC&A Rules". Since the notice sent to the petitioner was returned with the endorsement that he is outside India, notice was published in newspapers. He remained ex parte the disciplinary proceedings. The enquiry concluded against him, resulting in his removal from service, as per order dated 20.10.1994, published in the newspapers on 23.11.1994.

2. Though he seeks to quash Ext.P1 also, the petitioner appears to have accepted that situation, by moving the Assistant Educational Officer, 1996, seeking pensionary benefits. The AEO, as per Ext.P2 order, held that the petitioner is not entitled to pensionary benefits in terms of the rules because he was removed from service with effect from 19.9.1992 due to unauthorised absence and that his past services stand forfeited. The AEO quoted Rule 29 in Part III KSR in support of that decision.

3. This writ petition is filed challenging the vires of Rule 29 in Part III KSR, seeking to quash Exts.P1 and P2 and for a direction that the petitioner be granted all pensionary benefits counting his service.

4. Learned counsel for the petitioner, at the outset, stated that the challenge to the vires of Rule 29 in Part III KSR is not pressed. That apart, Rule 29 of Part III KSR which provides that resignation, dismissal or removal entails forfeiture of past

service, is one, by which, any benefit linked with and relatable to past service is automatically denied. It has been so held by the Division Bench of this Court in **Chandrasenan** v. **State of Kerala** [1999 (3) KLT 357]. The denial of benefits linked with and relatable to past service to a public servant, whose conduct and service lead to his removal or dismissal from service or if he resigns from service is neither unreasonable nor arbitrary. The said Rule, on the face of it, is not ultra-vires the Constitution of India or the Kerala Public Services Act, 1968.

5. Learned counsel for the petitioner confined his arguments to be in support of the petitioner's attempt to gain retiral benefits by way of pension. The petitioner's case is that he had prior aided school service to his credit, which, in terms of the rules, is to be tagged along with the Government service from 8.1.1970, to hold that his total length of service is more than 12 years, beyond the minimum required for grant of pension. Assailing the reference made by the AEO in Ext.P2, to Rule 29 in Part III KSR, it is argued that it is not Rule 29 in Part III, but

Rule 96 in Part I KSR, that would apply in the context. It is accordingly argued that by virtue of the Note to Rule 96 in Part I KSR, wilful absence from duty after the expiry of leave is to be treated only as misbehaviour for the purpose of Rule 21 in Part I and therefore, the liability of the petitioner for absence from duty, could be only that provided in Rule 21 in Part I KSR, viz., that he may be transferred from one post to another and it cannot result in his dismissal or removal from service.

6. Per contra, learned Government Pleader argued that the Note to Rule 96 in Part I KSR is only one that enables the Government to treat the wilful absence from duty after expiry of leave as misbehaviour and therefore, a ground to make an order transferring the officer from one post to another, invoking Rule 21 in Part I KSR, and that the said provision does not inhibit the treatment of such a situation as a case of indiscipline and to proceed against the erring officer under the CC&A Rules. It is argued by her that the officers taking leave are bound by the conditions stipulated in the orders granting leave and the rules,

and still further, that Appendix XII A in Part I KSR providing the rules for grant of leave without allowances for taking up employment abroad clearly provides in clause 6 thereof that the service of an officer, who does not return after the expiry of leave, shall be terminated after following the procedure under the CC&A Rules. It is accordingly argued that the impugned action is unassailable and the plea of the petitioner to apply Rule 96 and thereby Rule 21 in Part I KSR is unsustainable.

7. For the purpose of appreciating the rival contentions, the following provisions of KSR are relevant:

(i) Rule 21 in Part I

> (a) The Government may transfer an officer from one post to another; provided that, except-
>
> (1) on account of inefficiency or misbehaviour,
>
> or
>
> (2) on his written request,

an officer shall not be transferred substantively to, or except in a case covered by rule 58, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under rule 18.

(b) Nothing contained in clause (a) of this rule or in clause (18) of rule 12 shall operate to prevent the transfer of an officer to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of clause (a) of rule 18.

(ii) Rule 96 in Part I

In the case of an officer governed by these leave rules who remains absent after the end of his leave the period of such overstayal of leave is, unless the leave is extended by the competent authority treated as follows:-

(i) as half-pay leave to the extent such leave is due, whether the overstayal is supported by a medical certificate or not;

(ii) leave without allowances to the extent of the period of half-pay leave due falls short of the period of overstayal.

The officer is not entitled to leave salary during such overstayal of leave not covered by an extension of leave by competent authority.

Note:- Wilful absence from duty after the expiry of leave will be treated as misbehaviour for the purpose of rule 21, Part I.

(iii) Clause 6 of Appendix XII A to Part I as applicable till 9.2.1993, i.e., during the period of the petitioner availing his last spell of five years' leave.

Normally, leave without allowances under these rules (for taking up employment) may be sanctioned only up to a maximum period of five years. But applications for extension of the leave for a further period of five years or part thereof may be entertained. The maximum period of leave that may be sanctioned to an officer during his entire service shall be limited to ten years. If the officer who has availed himself of the leave without allowances for a total period of ten years, whether continuously or in broken periods, does not return to duty immediately on the expiry of the leave, his service shall be terminated after following the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules 1960. This condition shall be incorporated in every order sanctioning leave (all individual sanctions to be issued.)

(iv) Rule 29 in Part III

> (a) Resignation of the Public Service, or dismissal or removal from it, entails forfeiture of past service.

8. The reference to Rule 96 in Part I is made to extend an argument on the basis of the Note to that rule and not on the body of the rule as such. A Note to a statutory rule is merely explanatory in nature and, thereby, the rigour of the main provision is not diluted. It is not to enlarge the scope of the rule or to provide anything in derogation of the rule to which a Note is being appended. See the decision of the Apex Court in **V.B.Prasad** v. **Manager, P.M.D.U.P. School and Others** [2007 (5) SCALE 543].

9. Bearing the aforesaid principle in mind, on examining Rule 96 in Part I, it can be seen that it is a rule that provides for the manner in which the period of overstay has to be treated by the competent authority. The Note to that rule which states that wilful absence from duty after the expiry of the leave period will

be treated as misbehaviour for the purpose of Rule 21 in Part I KSR is essentially, an explanatory note to Rule 21 in Part I KSR because it explains the scope of the term “misbehaviour” in that Rule. It is not one intended to foreclose the applicability of all other rules or to deprive the employer Government of its rights and powers to proceed against an erring employee, on counts of indiscipline, for overstayal of the period of leave. If I were to take it that by virtue of the Note appended to Rule 96 in Part I KSR, all rules other than Rule 21 in Part I KSR are excluded, the only liability of a person, who had overstayed the period of leave, would be to be transferred to another post, in terms of Rule 21 in Part I KSR on account of misbehaviour. If the Note to Rule 96 in Part I KSR is so understood, the Government would stand compelled to continue to employ such a person, who has overstayed the leave and to deal with him, at the worst, only by transferring him from one post to another. This is not the intention of the Note to Rule 96. Such an interpretation is just not available. It is not intended. Any such application would undermine the public interest embedded in public service.

10. The entitlement of a Government servant is to apply for leave. The grant of leave is a condition for its enjoyment. Leave not granted, cannot be availed and enjoyed. If leave is granted, its enjoyment is dependent on the terms and conditions of the grant, as prescribed by the laws or imposed by the employer with the sanction of law. A leave granted for five years carries with it the obligation to return and join duty on termination of the period of leave. This means that an employee who overstays after the period of leave, breaches by his overstayal, not only the directions of the laws and the lawful conditions imposed by the Government as per the order granting leave, thereby becoming liable for misbehaviour under Rule 21 in Part I KSR, but also misconducts himself and thereby becomes liable to be proceeded on counts of indiscipline, in terms of the CC&A Rules. Therefore, notwithstanding the Note to Rule 96 in Part I KSR, continuous absence from service by overstayal after expiry of leave is, by itself, a misconduct that could lead to imposition of

punishment, including removal of the petitioner from service, after following the procedure prescribed.

11. Rule 110 B in Part I KSR provides that the rules for grant of leave without allowances for taking up employment abroad or within India are given in Appendix XII A. Rule 88 in Part I KSR contains an exception that the limitations as to the duration of leave in clause (ii) thereof shall not apply to grant of leave without allowances regulated by the rules in Appendix XII A. Therefore, the provisions contained in Appendix XII A are a comprehensive set of rules which exclusively deal with the conditions of grant of leave without allowances for taking up employment abroad or within India. Appendix XII A was inserted in the KSR with effect from 16.12.1983. The third spell of leave of five years was availed by the petitioner from 19.9.1987. At that time, Rule 6 in Appendix XII A had provided that the maximum period of leave that may be sanctioned to an officer during his entire service shall be limited to 10 years. However, a third spell of leave is seen to have been granted for a further

period of five years, from 19.9.1987, after the petitioner had already enjoyed leave for 10 years. When statutory rules are framed to govern the grant of a particular type of leave, prescribing conditions and limitations of such grant, it has to be necessarily ensured that the grant does not exceed the provisions of those rules. That apart, Rule 11 in Appendix XII A provides that no relaxation of any of the Rules in that Appendix will be allowed. In the context of leave rules falling under Annexure XII A, particularly Rule 11 thereof, it is wholly inappropriate and impermissible for the Government to issue any order referable to Rules 6 and 7 in Part I KSR, enabling an officer to avail leave in excess of the period prescribed under Rule 6 in Appendix XII A, for taking up employment abroad or within India.

12. Rule 6 in Appendix XII A in Part I KSR, as it stood while the petitioner availed the third spell of leave and as it stands now, provides that if the officer who has availed himself of the leave without allowances for the maximum period, whether

continuously or in broken periods, does not return to duty immediately on the expiry of the leave, his service shall be terminated after following the procedure laid down in CC&A Rules. Rule 9 in that Appendix provides that those officers who absent themselves unauthorisedly without getting the leave sanctioned under the Rules in Appendix XII A shall be proceeded against and their services terminated after following the procedure laid down in CC&A Rules. It further provides that request for re-entertainment in Government service in such cases as well as in cases covered by Rule 6, will be summarily rejected. Rule 11 in that Appendix provides that no relaxation of any of the Rules in that Appendix will be allowed. Hence, it is the mandate of law that in the event contemplated in Rule 6, the officer is liable to be proceeded under the CC&A Rules and if it is proved that he had availed the maximum leave under Appendix XII A and had not returned to duty immediately on the expiry of such leave, his service shall be terminated. That has happened in the case of the petitioner. There is no jurisdictional

error or legal infirmity in the action taken by the respondents in that regard.

13. As a consequence of his removal from service, the petitioner automatically fell within the provisions of clause (a) in Rule 29 in Part III KSR, which provides that removal from public service entails forfeiture of past service. This means that the decision of the AEO contained in the impugned Ext.P2 is in accordance with law.

For the foregoing reasons, this writ petition fails. The same is accordingly dismissed. No costs.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.

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